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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1160

DAVID FISHER,

Petitioner,

vs.

JACK L. MEDWEDEFF, TRUSTEE IN THE MATTER OF DAVID FISHER, INDIVIDUALLY AND TRADING AS FEDERAL SALES COMPANY, BANKRUPT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Your Petitioner, David Fisher, respectfully shows:

The purpose of this petition is to request this Court to review and reverse the judgment and decree of the Court of Appeals of Maryland, the Court of last resort of the State of Maryland in which a judgment entered by the Baltimore City Court on June 14, 1944, in favor of Jack L. Medwedeff, trustee in the matter of David Fisher, individually and trading as Federal Sales Company, bankrupt, against the bankrupt, David Fisher, in the amount of $39,760.10, was affirmed.

The suit was originally instituted in the Baltimore City Court, by the filing of a declaration, at law, on June 8, 1943, by the said Jack L. Medwedeff, as trustee appointed by the District Court of the United States for the District of Maryland, in the matter of David Fisher, individually and trading as Federal Sales Company, bankrupt, in an action ex contractu, based upon a certified copy of an Order of W. Ainsworth Parker, Referee in Bankruptcy, dated April 15, 1940, directing the bankrupt, David Fisher, the petitioner herein, to turn over to the said Jack L. Medwedeff, Trustee in Bankruptcy, on or before May 15, 1940, the sum of $32,073.10 in cash or merchandise, which order, usually referred to in bankruptcy proceedings as a "turn-over order", was affirmed June 13, 1940, by the District Court of the United States for the District of Maryland in Bankruptcy.

The declaration quoted the order of the Referee in Bankruptcy of the District Court of the United States, and the order affirming the same, alleged that the time for appeal had passed, that said order has not been complied with, that no part of the sum of $32,073.10 has been paid to the plaintiff, that on August 1, 1940, the bankrupt was found by the District Court of the United States for the District of Maryland, In Bankruptcy, to have dissipated said funds and merchandise, that the defendant was discharged from pending contempt proceedings for non-compliance with said order, and that the defendant is indebted to the plaintiff under said order for the sum of $32,073.10 with interest from June 13, 1940. A copy of the order of the District Court of the United States for the District of Maryland, certified by the Clerk of that Court to be "a true copy of the Order of Court affirming turn-over Order of Referee dated April 15, 1930" was filed with the declaration (Rec. pp. 1-3).

The petitioner herein, as defendant in the proceedings, filed a demurrer to the declaration, and stated the grounds to be:

"1. That the said declaration is bad in substance and insufficient in law.

"2. That the turn-over order of the United States District Court for the District of Maryland in Bankruptcy, dated June 13, 1940, does not establish a cause of action upon which the Trustee in Bankruptcy can sue the bankrupt in a State Court or in any other Court.

"3. That the cause or causes of action on the claims of the creditors whom the Trustee in Bankruptcy represents are vested in the creditors alone for which suits may be instituted in their name and not by the Trustee in Bankruptcy allegedly for their benefit.

"4. And for other reasons to be shown at the hearing of this demurrer." (Rec. pp. 4-5.)

This demurrer was overruled, with leave to plead. Within the time limited the defendant filed the following pleas:

"1. That he never promised as alleged.

"2. That he never was indebted as alleged.

"3. That the alleged cause of action did not accrue within three years before the filing of the declaration in this case.

"4. That the alleged order of the District Court of the United States for the District of Maryland dated June 13, 1940, does not constitute a cause of action upon which the Trustee in Bankruptcy can bring suit.

"5. That the United States Bankruptcy Statutes do not give the Trustee in Bankruptcy a right of action against the bankrupt to recover assets which the bankrupt is alleged to have failed to deliver to the Trustee.

"6. That the alleged order of the District Court of the United States for the District of Maryland dated June 13, 1940, affirming the Order of the Referee in Bankruptcy dated May 15, 1940, is a mere administrative directive order and does not constitute a judgment or decree of the said Referee or of the District Court of the United States for the District of Maryland.

"7. That the alleged claim upon which this suit is brought is vested in the creditors of the said David Fisher who may pursue the remedies afforded them by law.

"8. That certain of the creditors of said David Fisher whom the plaintiff trustee in bankruptcy represents as such trustee have reduced their claims to judgment and this suit, therefore, constitutes a duplication of actions for the same debt or debts." (Rec. pp. 9-10.)

The plaintiff demanded the particulars of the defendant's first and second pleas and the nature of the evidence to be offered in support thereof. In answer thereto the defendant filed the following particulars:

"That at the trial of the case an affirmative defense will be presented under said pleas and the precise nature of the evidence to be offered in support thereof will be that the plaintiff has no right of action against this defendant;

"That the order of the District Court of the United States for the District of Maryland dated June 13, 1940, does not constitute a cause of action upon which the Trustee in Bankruptcy can bring suit; that the United States Bankruptcy Statutes do not give the Trustee in Bankruptcy a right of

action against the bankrupt to recover assets which the bankrupt is alleged to have failed to deliver to the Trustee; that the alleged order of the District Court of the United States for the District of Maryland, dated June 13, 1940, affirming the order of the Referee in Bankruptcy dated May 15, 1940, is a mere administrative directive order and does not constitute a judgment or decree of the said referee or of the District Court of the United States for the District of Maryland;

"That the alleged claim upon which this suit is brought is vested in the creditors of the defendant who may pursue the remedies afforded them by law;

"That certain of the creditors of the said defendant have reduced their claims to judgment and this suit constitutes a duplication of actions for the same debt or debts;

"That the alleged order of the District Court of the United States for the District of Maryland, dated June 15, 1940, is inadmissible in evidence as a judgment or decree of a court of competent jurisdiction;

"That the alleged order of the District Court of the United States for the District of Maryland, dated June 13, 1940, does not constitute a contractual obligation upon which a suit in contract may be brought; and that the defendant herein is not indebted in any manner contractually or otherwise to the plaintiff." (Rec. pp. 11-12.)

The plaintiff demurred to all eight of the above pleas, which demurrer was sustained by the Court with leave to the defendant to plead further.

Within the time limited the defendant filed two additional pleas numbered 9 and 10, as follows:

"9. That if the order of the District Court of the United States for the District of Maryland dated June 13, 1940, affirming the order of the Referee in Bankruptcy dated

May 15, 1940, is a judgment or decree of the said District Court of the United States for the District of Maryland, no suit upon said judgment or decree is required to constitute the same a lien in any jurisdiction within the State of Maryland because any judgment or decree of the District Court of the United States for the District of Maryland properly certified may be recorded in any jurisdiction of the State of Maryland, and thereby said judgment or decree will have the same lien upon property of any judgment debtor and be subject to the same rights of enforcement thereof as any judgment or decree entered in the State Court;

"10. That the order of the District Court of the United States for the District of Maryland dated June 13, 1940, affirming the order of the Referee in Bankruptcy, dated May 15, 1940, is not a judgment or decree of another State upon which suit may be brought in the State of Maryland in the same manner as a judgment or decree of any other State of the United States." (Rec. p. 13.)

The plaintiff demurred to the additional pleas Nos. 9 and 10, and the Court sustained the demurrer with leave to amend or plead further. The defendant declined to plead further or amend, and on June 14, 1944, the Baltimore City Court entered judgment by default against the defendant in the proceedings, the petitioner here, and assessed damages in favor of the plaintiff in the proceedings for $39,760.10 and costs of suit. (Rec. pp. 15-16.)

From this judgment an appeal was prosecuted by the defendant in the proceedings, petitioner here, to the Court of Appeals of Maryland, and by decision and judgment of that Court, which became final on January 19, 1945, the judgment of the Baltimore City Court was affirmed, costs to be paid by the petitioner here. (Rec. pp. 17-21.)

Jurisdictional Statement

The basis of jurisdiction of the Supreme Court of the United States in this case is that there is involved a Federal Statute, the provisions of the Federal Bankruptcy Act.

The statutory provision which sustains the above jurisdiction is:

Judicial Code Sec. 237 (28 U. S. C. 344).
Rector v. *City Deposit Bank Co.*, 200 U. S. 51; 51 L. Ed. 596; 27 Su. Ct. R. 294.

The statute here involved is the Federal Bankruptcy Act, and particularly sections 46, 96, 107 and 110 directly and incidentally, sections 2 and 14.

The Judgment to Be Reviewed

The judgment of the Court of Appeals of Maryland, which became final on January 19, 1945, in which it was held that under the provisions of the Federal Bankruptcy Act, a trustee in bankruptcy may sue the bankrupt for whose estate he is acting, upon a turnover order of the bankruptcy Court and obtain money judgment against the bankrupt.

The nature of the case was a suit at law in a State Court by a trustee in bankruptcy against the bankrupt for whose estate he was acting, upon a certified copy of a turnover order of the Bankruptcy Court. Judgment was entered for the plaintiff against the defendant and on appeal the judgment was affirmed. The defendant, bankrupt, requests review of the decision.

The grounds upon which it is contended the questions involved are substantiated are:

(1) Does the Federal Bankruptcy Act give to the trustee in bankruptcy appointed under the provisions of said Act

a right or power to sue the bankrupt, for whose bankrupt estate such trustee is acting, upon a turnover order of the Bankruptcy Court appointing such trustee, directing the bankrupt to turn over to the trustee a sum of money in cash or merchandise, and recover a money judgment against the bankrupt?

(2) Is a turnover order of a Bankruptcy Court, as referred to in the aforegoing paragraph (1), a judgment or decree of such Court?

(3) Does a turnover order of a Bankruptcy Court, as referred to in the aforegoing paragraph (1), create any contractual obligation of the bankrupt to the trustee in bankruptcy, upon which suit can be brought in a State Court?

The stage in the proceedings in the court of first instance, in which the federal question herein sought to be reviewed was raised, was in the demurrer of the defendant in said proceedings, the petitioner here, to the declaration of the trustee in bankruptcy, by which demurrer the defendant in the proceedings, petitioner here, challenged the right and power of a trustee in bankruptcy under the Federal Bankruptcy Act to sue the bankrupt for whose estate he was acting as trustee on a turnover order and contended that section 46 of the bankruptcy act did not give any such power and right to the trustee in bankruptcy. This question was again raised in the pleas to the declaration, and in addition thereto the defendant in the proceedings, petitioner here, claimed that a turnover order of a bankruptcy court in pursuance of the powers granted to the bankruptcy courts, was not a judgment or decree of such courts upon which suit could be brought in another Court, either State or Federal.

These claims and contentions were again presented in the proceedings on appeal to the Court of Appeals of Maryland from the judgment of the Baltimore City Court, the Court of first instance, in favor of the plaintiff.

The method of raising the federal question was, as stated above, by demurrer to the declaration of the trustee in bankruptcy, challenging the right and power of the trustee under the Bankruptcy Act, and particularly under Section 46 of the Act, to sue the bankrupt for whose estate such trustee was acting, upon a turnover order, and recover a money judgment against the bankrupt. The Baltimore City Court, the Court of first instance, overruled the demurrer, holding that the trustee in bankruptcy did have such power and right to sue the bankrupt for whose estate such trustee was acting and required the defendant in the proceedings petitioner here, to plead to the declaration. In the pleas to the declaration the defendant in the proceedings, petitioner here, again challenged the right and power of the trustee to sue the bankrupt and also contended that a turnover order is not a judgment or decree of the bankruptcy court upon which suit may be brought in a State Court and a money judgment recovered. The Baltimore City Court sustained the plaintiff's demurrers to the defendant's pleas, holding that the trustee had such power and right and that the turnover order could be made the subject of a suit in the State Court.

The Federal Statutes Involved

The primary source of the power given to a Trustee in Bankruptcy to prosecute or defend proceedings at law and in equity is granted by Section 46 of the Bankruptcy Act, as follows:

"Section 46.

"Jurisdiction of United States and State Courts.

"a. The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the Courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant."

It is contended by this petitioner that this statute grants to the trustee the power to bring or prosecute *only* those suits which the bankrupt himself might have brought or prosecuted if the bankruptcy proceedings had not been instituted. In other words, the trustee in bankruptcy stands in the place of the bankrupt for the purpose of bringing or prosecuting suits concerning the property acquired or claimed by the trustee and has power to proceed to the same extent as though the bankruptcy proceedings had not been instituted and such controversies were between the bankrupt and such adverse claimants.

The source of title to the property of the bankrupt estate which becomes vested in the trustee in bankruptcy by virtue of his appointment, is derived through the provisions of section 110 of the Bankruptcy Act, as follows:

"Section 110

"Title to property

"a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original peti-

tion proposing an arrangement or plan under this title, except insofar as it is to property which is held to be exempt, to all

"(1) documents relating to his property;

* * * * * * *

"(4) property transferred by him in fraud of his creditors;

"(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered;

* * * * * * *

"e. (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

"(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomsoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this sub-section e. is valid under applicable Federal or State laws.

"(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State Court which would have had jurisdiction, if bankruptcy had not intervened and any Court of Bankruptcy shall have concurrent jurisdiction."

To the same and similar effect are sections 96 and 107 of the Bankruptcy Act, which sections give the trustee in bankruptcy the power to avoid preferences given, and liens obtained, or transfers made within four (4) months prior to the adjudication in bankruptcy.

The Bankruptcy Act provides special proceedings against the bankrupt for the recovery of property and assets alleged to be wrongfully withheld by the bankrupt from the trustee. These provisions are set forth in sections 2 and 14 of the Bankruptcy Act.

Reasons Relied Upon for the Allowance of the Writ

As more specifically set forth in the brief attached to this petition, with supporting authorities, it is contended that the decisions of the Federal Courts in construing Section 46 above quoted have held that the provisions of this section relate only to controversies between the trustee in bankruptcy and adverse claimants. There has been no expression in favor of any right of the trustee in bankruptcy to sue the bankrupt for whose estate he is acting as such trustee for the purpose of obtaining a money judgment against him.

In addition to the decision of the Court of Appeals of Maryland, the judgment of which Court this petition requests review, there is one other decision of the District Court of Appeals of California, Second District, Division 2, in the case of *Sampsell* v. *Gittleman*, 130 Pac. (2d) 486,

which has held the trustee in bankruptcy to have such right of action against the bankrupt.

In view of the conflict of decisions in construing section 46, it is respectfully submitted a substantial Federal question is presented.

Also, in addition to the above, but as a part of the same question, is the further question of the character of a turnover order, is it a judgment or decree of the Bankruptcy Court which can be enforced as any other judgment of a court of competent jurisdiction, or does it create by judicial mandate a contractual obligation of the bankrupt to the trustee in bankruptcy upon which suit may be brought, or is it a mere administrative order and failure to comply subjects the bankrupt only to the punishments and penalties provided for in the Bankruptcy Act, that is, contempt or denial of discharge.

Turnover orders are becoming very important, are being applied for very frequently by trustees in bankruptcy, and therefore it is respectfully submitted, the powers of the Bankruptcy Courts, the rights, duties and powers of the trustees in bankruptcy in the matter of turnover orders should be made certain and definite.

It is, therefore, respectfully submitted that the questions herein presented call for the exercise by this Court of its supervisory powers by the granting of a Writ of Certiorari to the Court of Appeals of Maryland, and thereafter reviewing and reversing the decision and judgment of said Court.

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